Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1763

ARDIE McBREARTY, Petitioner Pro Se

versus

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI

TO

THE UNITED STATES COURT OF APPEALS

FOR

THE NINTH CIRCUIT

Ardie McBrearty
P.O. Box 353
Springdale, Ark. 72764
Tele: 501-925-2183
Petitioner, Pro Se

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Ardie McBrearty, Petitioner herein, prays that this Court will issue a Writ Of Certiorari to the U.S. Court Of Appeals for the Ninth Circuit to review their Judgment entered in this case on February 12, 1979.

OPINIONS/JUDGMENTS BELOW

The Opinion/Judgment of the U.S. Court of Appeals for the Ninth Circuit (USCA9) sought to be reviewed is, to the best of Petitioner's knowledge, unreported and Petitioner has never seen a copy of same, even though Petitioner has formerly requested one, and said Opinion/Judgment is printed in Appendix A-1, infra. The Findings Of Fact, Conclusions Of Law and Order of the U.S. District Court for the Central District of Calif.

(USDC CD Ca) is printed in Appendix A-2, infra. The Judgment of USDC CD Ca is printed in Appendix A-3, infra.

JURISDICTION

The Opinion/Judgment of USCA9 (Appendix A-1, infra) was entered on February 12, 1979. A timely Petition For Rehearing was denied on April 24, 1979, the Order for which is printed in Appendix B-1, infra. Petitioner's Motion For Stay Of Mandate was timely filed and is pending before the Appellate Court for the Ninth Circuit, and is printed in Appendix B-2, infra.

The Jurisdiction of this Court is invoked pursuant to 28 USC, Section 1254(1).

QUESTIONS PRESENTED

1. May the trial court ignore the Federal Rules Of Criminal Procedure by never calling upon the defendant to make a plea to the offense set forth in the 'indictment', thus denying procedural due process of law?

2. May the trial court deny procedural due process of law by denying a defendant timely-requested particulars (specifics) essential to the preparation of a proper defense, and without which the defendant was found 'guilty'?

3. May the trial court ignore the fact that the Secretary Of The Treasury did not find it neccessary to make any sort of 'income tax return' in behalf of the defendant, which fact establishes that no such 'return' was actually 'required' of such defendant for the year set forth in the indictment?

4. May the trial court deprive a defendant of procedural due process of law by not holding the government to establishing the "corpus delicti", and thus subject the defendant to suffer 'conviction'?

5. May the trial court deny a defendant procedural due process of law by forcing such defendant to the rigors of a criminal trial under the jurisdiction of a 'civil statute', namely, Title 26, USC?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following are the Constitutional and statutory provisions involved herein, the applicable text of each being printed in Appendix C, infra:

U.S. Constitution, Article I, Section 8.

U.S. Constitution, Article VI.

U.S. Constitution, Amendment Five.

U.S. Constitution, Amendment Six.

Title 26, United States Code, Section 6012

Title 26, United States Code, Section 6020(b)

Title 26, United States Code, Section 6103(d)

Title 26, United States Code, Section 7203

Title 31, United States Code, Section 391

Title 31, United States Code, Section 454

ADMINISTRATIVE RULINGS AFFECTING STATUTES

Internal Revenue Service Revenue Ruling 76-249

* * * *

STATEMENT OF THE CASE

Petitioner was 'indicted' by the federal Grand Jury at Los Angeles, California on April 5, 1977, charging one count of willful failure to file an income tax return for the year of 1973 in violation of 26 USC 7203.

The U.S. District Court for the Central District Of California, the court of first instance, probably assumed 'criminal' jurisdiction under 18 USC 3231 though the charge was brought forward via the 'civil' statute, 26 USC 7203, although Petitioner has been unable to find any specific invocation of jurisdiction by the trial court of the government in any of the records of this case.

On April 18, 1977, Petitioner appeared before a Magistrate who assigned the Case to the Honorable Warren J. Ferguson, District Court Judge, with a substitute sitting temporarily in his stead, the Honorable Robert M. Takasugi, for the 'arraignment' hearing. There was no plea requested of Petitioner, nor was a plea taken or recorded to this day.

The 'indictment' charged that Petitioner "had and received" a specific number of "$'s" and "that by reason of such income he was required by law... to make an income tax return...".

Since this was an issue brought forward by the Internal Revenue Service under the IRS Code, Title 26, USC, and knowing that the IRS had at least two separate definitions for the symbol "$", Petitioner timely filed a pre-trial Motion For A Bill Of Particulars in which, amoung other things, he asked for the specific and precise definition of the symbol "$", as used by the government in the 'indictment' and where such precise definition of said symbol "$" could be found in the United States Code. Petitioner also stated that said definition was absolutely necessary to prepare an adequate defense. The government gave only the answer that such symbol "$" was a 'dollar', but did not define either the symbol or the word, and

opposed granting Petitioner any sort of definition. The trial court sustained the government's refusal.

It is important that this Court take notice that, from this point forward, the trial court and apparently the Court of Appeals operated on the presumption that:

A. The common-usage, by the general public, of one type of "$" was sufficient for purposes of trial;

B. The Internal Revenue Service operates on the very same "common-usage" of a single definition as apparently does the general public;

C. Petitioner "had and received" whatever the government accused Petitioner of "having and receiving".

D. That whatever Petitioner actually "had and received" was contained in some Title of the United States Code, even though the government never did so state; and

E. The Internal Revenue Service would not have more than one definition of said symbol "$" and therefore, the Petitioner must have actually "had and received" that which he was accused of "having and receiving".

Though the Federal Rules Of Criminal Procedure, Rule 7(c), calls for "a plain, concise and definite written statement of the essential facts constituting the offense charged.", the defendant was left with an ambiguous "statement" and with no means of defending same. And though Amendment Six guarantees that the defendant shall "know the nature and cause of the accusation", the defendant was forced to trial without such knowledge.

In order to eliminate the ambiguity of the accusation, Petitioner filed a second 'request' for the desired particulars with a 'Motion For Supplementary Discovery' on October 18, 1977. This 'Motion' was also denied.

Petitioner had timely filed a 'Motion To Dis-

miss Due To No Requirement To File', which 'Motion' was based upon the fact that the Secretary Of The Treasury had not made/filed an 'income tax return' in behalf of the Petitioner for subject year although all information pertaining to Petitioner's business finances had been in the possession of the Secretary for nearly three years. Since said Secretary was cognizant of all the financial facts relating to Petitioner's business, surely said Secretary would have obeyed the mandate set forth in 26 USC 6020(b) had a return for subject year actually been required. The trial court denied this 'Motion' also.

Petitioner was forced to trial with inadequate information concerning the specifics of the offense charged. Therefore, Petitioner elected to proceed without benefit of a jury due to the fact the case would have to based primarily upon the law, rather than an accumulation of certain facts.

The prosecution's case consisted only of presenting "gross receipts" that were supposedly "received" by Petitioner for subject year. There was no evidence or testimony presented by the government concerning Petitioner's business expenses whatsoever. Though 26 CFR 1.6.-3 sets forth the precise manner a business person is to determine the difference between "gross receipts" and "income", the government was not held to such an important requirement.

During cross-examination, Petitioner was able to elicit testimony along the line of 26 CFR 1.61 -3 from a prosecution witness, which testimony supported the obvious conclusion of the Secretary Of Treasury; that Petitioner had no 'requirement' to make/file a tax return for subject year.

Due to the trial court's operating on the previously cited 'presumptions', Petitioner was forced to rely upon the provisions of 26 CFR 1.61-3. At the close of the government's case, Petitioner moved the court for a 'Judgment Of Acquittal' based upon the government's failure to prove a

prima facie case that a 'requirement' existed for Petitioner to make/file such income tax return. The trial court withheld ruling on this 'Motion'.

Having been denied the specifics sought during pre-trial, Petitioner was unequipped to rebut the government beyond that already accomplished under cross-examination. Therefore, Petitioner rested the case for the defense and moved for a 'Judgment Of Acquittal' the second time. The trial court withheld ruling on the 'motion' once again pending presentation, by both parties, of 'Proposed Findings Of Fact And Conclusions Of Law'.

The trial court adopted those 'Findings' as presented by the government, printed herein as Appendix D, infra, which 'Findings' did not reflect the considerations contained in 26 CFR 1.61-3. Therefore, Petitioner was found 'guilty' of the charge.

Petitioner timely filed a 'Motion For Arrest Of Judgment' due to the fact that no 'plea' had ever been requested of Petitioner and that no plea was ever entered into the record. The trial court denied this 'Motion'.

Petitioner was sentenced on March 27, 1978 to ninety days per the Order printed herein in Appendix E, infra. A timely 'Notice Of Appeal' was filed along with a 'Motion To Proceed In Forma Pauperis', which 'Motion' was granted on April 14, 1978.

Petitioner's Brief For Appellant was timely filed in USCA9. The Issues raised in said Brief were:

I The District Court erred in denying Appellant specific information and/or items which were in Appellant's 'Request For Bill Of Particulars' and in Appellant's 'Motion For Supplementary Discovery'.

II The District Court erred in denying

Appellant's 'Motion To Suppress'.

III The District Court erred in denying Appellant's 'Motion To Dismiss Due To No Requirement To Make A Return'.

IV The District Court erred in its 'Findings Of Fact as concerns the trial and the verdict therefrom.

V The District Court erred in denying Appellant's 'Motion To Arrest Judgment'.

In capsule form, the gist of Petitioner's contentions, per Issue raised, is stated as follows:

I Petitioner was totally unable to prepare a proper defense due to the ambiguity of the accusation. The 'accuser' was left with a free hand to call "$" by whatever he chose. Petitioner has the Sixth Amendment right to "know the nature and cause of the accusation". That there is considerable difference between "earning" and "receiving". In the Case of United States vs Smith, 16 FRD 372, another IRS situation, the prosecution was ordered to produce the very information sought in the instant Case. That 'receipts' do not constitute the 'corpus delicti'.

II Petitioner established lack of 'good faith' on the issuance of the second 7602 Summons. In Donaldson v United States, 400 US 517, 'good faith' was set forth as a requirement. That the agents involved worked diligently to frustrate the efforts of Petitioner to have a judicial review of this second Summons by constantly changing the due date for the transfer of subject records. No IRS assessment was ever brought forward in this 'civil' investigation.

III The 'requirements for making a return' under 26 USC 6012. That the Secretary is mandated under 26 USC 6020(b) to make such return if one is in fact 'required'. That the word "shall" must mean precisely the same thing in the two Sections. The IRS had the information in their custody for

nearly three years. No effort was ever made by the government to present detailed data on Petitioner's business expenses. The Secretary of the Treasury obviously concluded no 'return' was actually required for the year at issue.

IV Petitioner was a contractor and had been for many years as a sole proprietor. That 26 CFR 1.61-3 sets forth the proper approach for determining whether 'gain' or 'profit' exists for the taxable year. Testimony of how Petitioner could have 'profited' by violating a federal law while working on a federal project, thus having reason to take the Fifth Amendment on 'tax return'. This was not an 'administrative violation' as assumed by the trial court. That Garner v U.S., 424 US 648 supported Petitioner's use of the Fifth Amendment in such situation. Therfore, the evidence did not support the 'Findings' of the trial court.

V The 'arraignment' scheduled for Petitioner was outside the requirements of 18 USC 3161(c). The 'hearing' violated Rule 10, FRCrP. The Case of Hamilton v Alabama, 368 US 52, sets forth that a 'plea' is necessary to "formulate the issue to be tried". The trial court asked the Petitioner, at sentencing: "Do you waive Arraignment for purpose of sentencing?" Petitioner replied: "I didn't understand the question". The trial court repeated the question verbatim. No 'waiver' was made. That Petitioner's 'court appointed counsel' never challenged the absence of a 'plea', so incompetence of counsel is at issue. Petitioner's rights were violated.

The government's response contained in their Appellee's Brief can be summed-up as follows:

A. Petitioner was actually seeking 'legal advice' in the Bill Of Particulars, as concerns the definition of the symbol "$". Petitioner's requests fall outside the scope of a bill of particulars. The Indictment "speaks with sufficient clarity".

B. That the Donaldson Case (supra) adequately covered the trial court's decision. Cited certain Ninth Circut decisions, alleging that such 'good faith' is not a part of the issue, but rather the timing of the 'recommendation for criminal prosecution' as being the deciding factor.

C. The word "shall" as appearing in Section 6020(b) is permissive or enabling, not mandatory. Citing a 'tax court' decision as authority. Thus, Petitioner's position is irrelevant.

D. That Petitioner was not a contractor but was an employee. That Petitioner received 'wages' not 'gross receipts', and therefore, was required to make/file a return for the year at issue. That Petitioner, not being a gambler, had no right to utilize the Fifth Amendment on his tax return. Set forth "Viewing the evidence in a light more favorable to the government", citing cases in support. Alleged Petitioner was not in the belief of the use of the Fifth Amendment, but rather "because he didn't believe in paying taxes." Also claimed trial court 'determined' Petitioner's tax return "was not a return".

E. Petitioner never made a 'plea' but waived such plea by proceeding as though a plea had been made. Cited Garland v State of Washington, 232 US 642. Failure to comply with FRCrP is not a jurisdictional defect.

Petitioner filed his Reply Brief for Appellant which contained, in concise form, the following:

I Since government stated the symbol "$" was in reference to the "dollar", that Congress had established a precise definition in 31 USC 314 & 316. The Internal Revenue Service had more than one definition due to their Ruling in IRS Revenue Ruling 76-249 (subsequently affirmed in 78-360). The evidence presented was not checks, but rather "warrants" which were not negotiable as are checks, but are written on the credit of the County. Such warrants fell under the Case of Don E. Williams Co.

v Commissioner of IRS, 97 S Ct 850. No evidence was presented at trial establishing that Petitioner ever "received" the amounts of "$" called for on the face of said 'warrants'.

II That Internal Revenue Service had shown bad faith in the issuance of the second Summons (7602) for the very same information already in the custody of the Secretary. Such 'bad faith' was a pertinent point in the Case of United States v Powell, 379 US 48 (1964) and the Case of United States et al v LaSalle National Bank et al, Sup. Court No. 77-365. Certain exhibits support the contentions of Petitioner.

III Appellee was attempting to alter the meaning of the word "shall", contrary to the Statute and the Case of United States v Harrison, 30 AFTR 72-5367. The Case of Connolly v General Construction Co., 269 US 385 made ambiguity in Statutes tantamount to deprivation of 'due process of law'.

IV Set forth that certain testimony established Petitioner had good and valid reason to utilize the Fifth Amendment on 1973 return. That Garner decision, supra, did not pertain only to gamblers and certain Ninth Circuit opinions supported Petitioner's use of such right. The court did not render a determination of Petitioner's use of the Fifth Amendment as a result of a judicial hearing on the issue. Such 'determination' was solely an administrative decision made by the Internal Revenue Service at the Service Center.

V Petitioner did not 'waive' arraignment. The Case of Garland v State of Washington did not apply since the issue of arraignment was raised prior to the Appellate Court. Either the FRCrP are binding upon all district courts or upon none of them. Justice calls for uniform application of all laws (see U.S. v Warrington, 17 FRD 25).

Oral arguments were heard in the USCA9 on

February 7, 1979 and that Court issued their Judgment, without Opinion, on February 12, 1979.

Petitioner timely filed a Petition For Rehearing and Rehearing En Banc in which he pointed out that the Circuit Court had overlooked or misapprehended certain fundamental points of law, to wit:

A The lack of jurisdiction of the trial court to proceed on a criminal action brought forward under a 'civil' Statute, namely, Title 26, USC.

B The ambiguity of the Indictment, causing Petitioner to be deprived of the knowledge of the "cause and nature of the accusation".

C The subject of "wages" as being other than 'income' as defined by Congress, and certain case citations in support thereof.

D The rejection of Petitioner's 'income tax return' for subject year by nothing more than an 'administrative determination'. The lack of the 'corpus' in the corpus delicti of the Case.

E Unequal application of a Statute of Congress, thus a denial of due process of law.

The Petition For Rehearing was denied and the Order filed on April 24, 1979. Petitioner timely filed a 'Motion For Stay Of Mandate' with USCA9, which 'Motion' is pending before that Court.

This Petition is timely filed with this Court.

* * * * * * * * *

REASONS FOR GRANTING THE WRIT

Preface:

The United States Constitution, along with the Bill Of Rights, Provides certain specific safe guards to protect the citizens of this Republic. Such safe guards are designed to provide due process of law for all defendants in United States courts as well as protect innocent citizens from abuse by overzealous bureaucrats. The Bill Of Rights include the following guarantees for the accused:

a. The right to not be compelled to be a witness against himself;

b. The right to not be deprived of life, liberty, or property without due process of law;

c. The right to a trial by an impartial jury of the accused's own peers;

d. The right to be informed of the nature and cause of the accusation;

e. The right to compulsory process for obtaining witnesses in his own behalf; and

f. The right to justice; impartial and objectively administered. This includes all officers of the Executive and Judicial Branches of our government, since each has sworn to support the U.S. Constitution which was designed to protect the citizens from tyranny in all forms.

If justice is to be honestly and fairly administered, the foregoing Rights are to be observed in all criminal cases, including those relating to 'income taxes', thus protecting the accused.

The United States Constitution was established as a means of protecting the citizens of each State from any threat, foreign or domestic, to their life, liberty or property. In an effort to ensure these protections, Congress has enacted

certain Statutes. Thus, hopefully, all citizens would be protected in the adminstration and adjudication of the laws of the Republic. It is unfortunate that so many 'laws' seem 'required' to simply fulfill the language set forth in our Constitution and the Bill Of Rights.

Equal Protection is more than just words to be bantered about. All citizens are entitled to, and have the right to expect absolute equality in the administering and adjudication of the laws of the Republic. The concept that certain laws can be administered or adjudicated in an arbitrary manner is abhorant to the very precepts contained in our Constitution. We need look no further than this revered document itself to be assured that all citizens, whether adminstratees or defendants, are to be accorded due process of law.

In the instant Case, we find where the legislative branch has failed to protect Petitioner by the ambiguity of the laws pertaining to money, and by the fact the Congress has allowed the executive branch to arbitrarily administer certain Statutes such as Title 26, USC. Even the Code of Federal Regulations is arbitrarily administered so that citizens are not accorded equality under the law. Then the executive branch, through its agencies, introduces additional ambiguity to the money system, thus failing to protect Petitioner. The judicial branch, through the trial court, has also failed to protect Petitioner by allowing such ambiguity to proceed through a criminal trial.

The executive branch, through the justice department, failed to protect Petitioner by abiding by the Rules Of Criminal Procedure, as well as bringing Petitioner to trial via a civil Statute. The trial court failed to protect Petitioner by failing to abide by the provisions of the FRCrP as well as proceeding in a criminal action under the auspices of a civil Statute, Title 26, USC.

One fundamental Constitutional principle is that the accused is presumed innocent until he is

proven guilty and that the government must establish beyond a reasonable doubt each essential element of the offense charged, all this, before a conviction can be secured. This is the basic principle contained throughout the Counstitution, most specifically in Amendments Five and Six. As an essential part of due process of law, the accused shall not be compelled to be a witness against himself; that he shall have a trial by an impartial jury; that he shall be informed of the "NATURE AND CAUSE OF THE ACCUSATION"; and shall have compulsory process for obtaining witnesses in his own behalf.

The purpose of the above cited requirements is obviously to compel the government to state specifically what it must prove in order to convict the accused; all this in order that such accused can properly prepare a defense to the accusation. In addition, we have the admonition at a trial that each witness is to "tell the truth, the WHOLE truth, and nothing but the truth". So that the trial will reveal all of the evidence, we are guaranteed the right to be informed of the "nature and cause of the accusation". Congress, in order to ensure this Constitutional provision, has given us the Federal Rules Of Criminal Procedure, Rule 7(c).

In the instant Case, when the trial court denied certain specifics which would have eliminated the ambiguity of the accusation, forced Petitioner into a position of inability to defend. Therefore, Petitioner chose a trial without a jury so that the trial court would bear the entire responsibility for the resulting proceeding. How can a jury be impartial when even the defendant (Petitioner) does not know what it is that he is accused of having "received"? How could a jury arrive at the truth of the facts if important facts are missing from the presentation? If this is an issue of law, then let the trial court decide it totally. No jury could ever acquit an accused under such

circumstances and the trial court's 'hands' would appear to be clean. Is this the justice that we all have come to expect in this Republic?

Can each district court and/or appellate court ignore the provisions in the FRCrP and Title 18, USC, as they see fit? In the instant Case, the executive branch, through the justice department, and the judicial branch, through the district court, has failed to abide by those rules and procedures outlined by Congress, thus having carried Petitioner to this High Court without his ever being asked to make a plea to the accusation. In addition, since Petitioner had no idea of what the government meant by the use of the symbol "$", there would have been no means for Petitioner to ascertain what a proper and appropriate plea to give the court if he had been asked for same. Is this the justice we all have come to expect?

The executive branch, through its agency, the Internal Revenue Service and the justice department, have failed to protect Petitioner by the ignoring of the provisions of the IRS Code and the Code of Federal Regulations, including but not limited to 26 CFR 1.61-3. And the judicial branch, through the district court has failed to protect Petitioner by either ignoring these provisions, or by being ignorant of them, all at Petitioner's loss.

A reviewing court should not permit a conviction to stand which is as wholly lacking in evidentiary support as is the instant Case. Bozza v United States, 330 US 160 (1947). See also Thompson v Louisville, 362 US 199 (1960).

Whenever the evidence presented at trial is insufficient, as a matter of law, to support the conviction, a reversal of such conviction is in accord with the historic principle that "independent trial judges and independent appellate judges have a most important place under our constitutional plan since they have the power to set aside convictions." United States ex rel. Toth v Quarles

350 US 11, 19 (1955).

Whenever the government is allowed to proceed on presumptive material (evidence?), and to the extent the courts allow same, it is to this degree that the accused is deprived of protection and to that degree that our Constitutional Rights are set aside. Petitioner has had many of this Constitutional Rights thus deprived in the instant Case.

Is our Constitution a document that erst - while administrators within the executive branch can simply ignore? Or, by some sort of exoteric method nullify the guarantees set forth to protect us all from precisely such tyranny? Such a conclusion would totally frustrate our Founding Fathers who worked so diligently to prevent same.

There can be no doubt that the Constitution was designed and adopted to protect the citizen through the requirements of 'due process of law'. Such 'due process' demands adherence to certain specific Rules of Procedure; observance of the entire Regulatory Provisions when attempting to determine the truth of the facts; recognition of one's Right to not appear as a witness against oneself, such as on an 'administrative form'; the determination, within the confines of law, of the 'validity' of the application of certain Rights as guaranteed by our Constitution.

Petitioner has been deprived of these necessary 'due process' requirements by the trial court in the instant Case, and this deprivation was sanctioned by the Appellate Court. This action by said courts is a departure from the usual course of judicial proceedings which we all have come to expect as being based upon Constitutional principles, thus calling for an exercise of this Court's power of supervision.

* * * *

ISSUES:

1. It is a denial of procedural due process of law for the trial court to ignore the FRCrP and the provisions set forth by Congress to protect an accused, such as Petitioner, by never reqesting a 'plea' to the accusation.

Rule 10, FRCrP, mandates the trial court to "call(ing) upon him to plead" to the accusation against Petitioner. The 'arraignment is when the 'issue' is joined if ever it is. In Hamilton v Alabama, 368 US 52, supra, we find: "Under federal law, arraignment is necessary to trial, and is preliminary stage where accused is informed of indictment and pleads to it, thereby formulating the issue to be tried". In addition, Congress has set forth in 18 USC 3161(c) that the arraignment SHALL take place within ten days after the filing of the Indictment. In the instant Case, no such hearing has been consumated to this day.

Since the government brought forth the action in the beginning (plaintiff), it was their responsibility to see that all procedures were timely and properly observed. This was not done and the Petitioner was thus deprived of procedural due process of law.

Petitioner could not have been in a position to make a 'plea' due to the fact certain specific portions of the accusation were too ambiguous for the Petitioner to ascertain the appropriate plea.

2. It is a denial of procedural due process of law to refuse Petitioner timely requested items concerning the specificity of the accusation.

Rule 7(c), FRCrP calls for a "plain, concise and definite written statement of the essential facts constituting the offense charged." We find in Amendment Six the guarantee that the accused shall know the "nature and cause of the accusation" against him. Anything in an Indictment (accusation) which is not "plain, concise or definite" leaves too much room for erroneous assumptions.

In order to avoid 'erroneous assumptions', any of which could affect the outcome of a trial, Congress has provided Rule 7(f), FRCrP, to totally eliminate "un-plain and indefinite" statements of facts concerning the accusation, or within such accusation. "A motion for 'bill of particulars' partakes of nature of motion for more definite statement and is not properly employed to elicit information that might be evidentiary." United States v Mangiaracina, D.C. Mo., 10 FRD 415, 416. "A 'bill of particulars' is an amplification of the complaint and its primary purpose is to better enable the moving party to prepare and serve a responsive pleading." Marin v Knopf, DC N.Y., 1 FRD 436, 437.

Petitioner filed a timely 'Motion' for certain specifics concerning the Indictment in order to eliminate ambiguity and indefiniteness which was contained within said Indictment. The primary specific was for a precise definition of the symbol "$", which was utilized in the accusation. Regardless of how many different definitions that Congress may have placed upon this symbol, it was the obligation of the plaintiff to arrive at a single and precise definition as that symbol was utilized in plaintiff's Indictment against Petitioner.

Since this Case originated with the executive branch, through the agency of the Internal Revenue Service, we must know which of the two definitions that said IRS utilizes was referenced in the Indictment. Petitioner refers to, and calls judicial notice to IRS Revenue Rulings 76-249 and 78-360. Without the knowledge of the specific definition of the symbol "$" as used in the Indictment, the Petitioner was left with inability to make a "responsive pleading", and without any ability to defend.

Petitioner was denied procedural due process of law in direct contradiction to the provisions

of Amendments Five and Six. Considering the fact that Petitioner was never called upon to plea to the Indictment, coupled with an obvious inability to ascertain what the appropriate plea should be, due to the ambiguity of the indefinite accusation, it is easy to ascertain that Petitioner has been deprived of procedural due process of law. Therefore, this Court should issue a Writ Of Certiorari to review the judgment of the lower court in their affirmation of such denial.

3. It is a denial of procedural due process for the trial court to ignore the mandates of our Congress, even though such fall into the area of administering the laws of Congress. Specifically, the mandate set forth in 26 USC 6020(b).

Since the Secretary Of The Treasury actually had all the necessary and pertinent information concerning Petitioner's financial circumstances in his care, custody and control for nearly three years, one must conclude that the Secretary had sufficient time to determine if a 'tax return' was actually required for the year at issue. What we have here is a total denial of the provisions set forth by Congress in 26 USC 6020(b) by both the executive branch, through the agency of the justice department, and the judicial branch, through the agency of the district court. Either the mandate set forth by Congress applies in all situations, or it is inapplicable in any situation. If this particular mandate (the word 'shall') is not applicable in Section 6020(b) of the IRS Code, then the very same mandate cannot be utilized in support of a criminal sanction as it is set forth in Section 6012 of the same Code.

The Constitution does not make a differentiation between civil mandates versus criminal mandates, pertaining to "life, liberty or property. This is further reinforced by the provisions of Amendment Fourteen which is a directive to the Several States. Since this is a Union of States,

That which applies to each part of the whole, must also apply to the whole, namely to the Union itself, the federal government.

The fact that Petitioner actually 'filed' a return for the year at issue does not support a 'requirement'. Also, the fact that said 'return' was 'administratively determined' to be unacceptable does not make it so. Since the 'acceptability' of a 'return', utilizing the Fifth Amendment to certain specific questions, is actually an issue of law, then such determination of the 'validity' of such use of the Fifth Amendment must be made by a court of law. This was never done.

Because Petitioner was deprived of procedural due process of law by the trial court, justice is wanting and this Court should issue a Writ of Certiorari to review the judgment of the appellate court due to their affirmation of this denial.

4. It is a denial of procedural due process of law for Petitioner to suffer conviction in a criminal case, brought forward under the auspices of a civil Statute, Title 26, USC, in which the government was not held to its burden of proof. Plainly, the government was obliged to prove each element charged in the accusation and each sub-element as would necessarily be included within each essential element.

The government, at trial, did not establish that Petitioner had ever 'received' the alleged number of "$" during the year at issue. Not one piece of evidence, nor one word of testimony was offered to support the allegation.

Since the government was never obliged to set one 'definition' for the symbol "$", they were free to call almost anything a "$", including numbers on a plain sheet of paper. Yet, the government never produced any evidence or testimony in support of their accusation on the subject.

Though the Internal Revenue Code is quite

complex, it is not actually difficult to determine the existence of 'gain' or 'profit' in the case of a sole proprietor, such as Petitioner. One must follow the instructions set forth in 26 CFR 1.61-3 carefully. This involves the use of an IRS Form, Schedule 'C', or 'Profit And Loss' Statement. In the instant Case this was never done in ccurt, and apparently wasn't done out of court by the government. This is an essential sub-element of the First Element of Requirement.

In order for the government to establish the 'corpus delicti' in this Case, the preceding was a necessary part.

The government's contention was that Petitioner was a 'wage recipient'. This, in the face of all the government's own evidence and testimony concerning Petitioner's Electrical Contracting business. So, considering the government's contention, we must turn to the IRS Code, Title 26, USC, in order to determine if 'wages' are included in Section 61 which sets forth the Congressional definitions of "income". The word "wages" does not appear here. Therefore, the government again failed in an important sub-element of the 'corpus delicti'.

Considering only the foregoing sub-elements, it becomes more than obvious that the trial court operated on far too many presumptions and/or allowed the government to proceed on same, all at the expense of justice and deprivation of rights belonging to Petitioner. Because the 'corpus delicti' cannot be assumed, the government should have been held to proving each element and sub-element of the accusation.

The second element of 26 USC 7203 which was a necessary part of the government's proof is involved with the 'income tax return' actually filed by Petitioner for the year at issue. Without a judicial determination on the validity of Petitioner's use of the Fifth Amendment in response to certain specific questions on the form,

there can be no establishing of the element of 'failure to file'. The principle sub-element is that no lower court decision in another case can be of an all determining effect. The Garner case, supra, points out the necessity of determining the 'validity' of the use of the Fifth Amendment in each and every case. Obviously, since Garner, supra, sets forth such strong language as a matter of law, such 'determination' must also be at law. This precludes any 'administrative determination' whatsoever of having any force or effect upon the outcome of a criminal proceeding of this type.

Once again, the government has failed to set forth the 'corpus delicti' of their accusation.

The third element of 26 USC 7203 concerns 'willfulness'. The sub-element here could be broken down into many parts. Simply stated, this one element is actually quite nebulous.

One sub-element of chief concern is the 'state of mind' of Petitioner at the time he filed his 1973 'income tax return'. Since there was considerable material attached to Petitioner's 'return', such material must present a 'picture' of that 'state of mind'. The government tried desparately to keep this material separate from the 'return' but did not succeed. The trial court apparently ignored the content of this material. The question naturally follows: "what was the basis for the trial court's decision on the subject of 'willfulness'?" The government presented nothing along the line of 'state of mind' of Petitioner, thus failing in this sub-element, and consequently, failing in the entire element of 'willfulness'.

Without the 'corpus delicti' and without the element of 'willfulness', the government's case failed in each every respect. Petitioner has been denied his Fifth Amendment right to due process of law and caused to suffer conviction in a criminal case through the auspices of a civil Statute, in which the government failed to establish even a

suggestion of a 'corpus delicti' and this Court should issue a Writ Of Certiorari to review the judgment of the appellate court due to their affirmation of such denial.

IN CONCLUSION

After reviewing the record of this Case, one thing stands out above all else. The trial court apparently was depending upon Petitioner 'proving himself innocent'. This is totally contrary to our system of justice. This Court has been very firm on this issue and principle of 'burden of proof'. In Davis v United States, 160 US 469, it was stated:

> "Strictly speaking, the 'burden of proof', as these words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from beginning to end, and applies to every element necessary to constitute the crime."

Upon objective review of the facts set forth in the 'Statement Of The Case' and under 'Reasons For Granting the Writ Of Certiorari', along with the contents of the Appendix, infra, Petitioner prays that this Court will recognize the denial of procedural due process of law by the trial court and the affirmation of such denial by the appellate court. Since such denial is negative to the accepted and usual course of our judicial system which is based upon Constitutional principles, Petitioner prays also that this Court will invoke its Power of supervision and that a Writ of Certiorari is issued to review the judgment of the United States Court Of Appeals for the Ninth Circuit.

Respectively submitted,

May, 1979
Tele:
(501) 925-2183

Ardie McBrearty
P.O. Box 353
Springdale, Ar 72764

McBREARTY vs. UNITED STATES

PETITION FOR WRIT OF CERTIORARI

APPENDIX

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APPENDIX A-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. ARDIE McBREARTY, Appellant.	)	No. 78-1917 ORDER AFFIRMING

Before: CHAMBERS, BRIGHT* and TANG, Circuit Judges.

The judgment of conviction is affirmed.

*The Honorable Myron H. Bright, United States Circuit Judge, Eight Circuit, sitting by designation.

(Note: Original on numbered paper)

APPENDIX A-2 and APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ARDIE McBREARTY, Defendant.)	)	NO. CR 77-432-F FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to the defendant's waiver of jury and request for special findings of fact, and having heard and considered all evidence presented at trial in the above-entitled case, it is hereby found as follows:

1. That defendant Ardie McBrearty received $9,102.98 in gross income during the calendar year 1973.

2. That defendant Ardie McBrearty submitted to the Internal Revenue Service, Oxnard California office on April 15, 1974 an Individual Income Tax Report (sic) Form 1040 for the calendar year 1973 which contained thereon no information as to amount of income received, or type and amount of deductions or exemptions.

3. That from the above, the Internal Revenue Service was unable to compute tax or tax liability, if any.

APPENDIX A-2 cont'd and APPENDIX D

4. That defendant Ardie McBrearty knew he was required to file an individual income tax return for the year 1973 and knew that the above-described document was not a valid income tax return within the meaning of the Internal Revenue Code and its regulations.

5. That the defendant's action in submitting the above-described document was willful.

And having considered all laws applicable to this case in light of the evidence presented, it is concluded as follows:

1. That having received $9,102.98 in gross income the defendant was required by law to file an income tax return.

2(a). That an Individual Income Tax Return Form 1040 containing no information as to amount of income, is not a return within the meaning of the Internal Revenue Code and its regulations.

(b). That the filing of such a document does not satisfy the filing requirement of the Internal Revenue Code or its regulations.

3. That the defendant was not excused from filing an Individual Income Tax Return Form 1040 by claiming a Fourth and/or Fifth Amendment privilege as to amount of income.

DATED: This 28 day of February, 1978.

/s/

WARREN J. FERGUSON
U.S. District Judge

APPENDIX A-3

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CRIMINAL MINUTES -- GENERAL

Case No. CR 77-432-F Date: Feb. 28, 1978

PRESENT: HON. WARREN J. FERGUSON JUDGE

Florence Kato Deputy Clerk — Marc Yohanna Court Re-orter

Deanne Smith
Asst. U.S. Attorney

U.S.A. v (DEFENDANTS LISTED BELOW)

(1) Ardie McBrearty

Present Bond

ATTORNEYS FOR DEFENDANTS

Michael Levine, DFPD (Advisory only)

PROCEEDINGS: FURTHER COURT TRIAL

Deft. represents to the Court that he will waive presence of advisory counsel and desires to proceed without him. The govt has no objections.

Oral arguments heard re Findings.

Court denies deft's motion for J/A, makes its findings and finds the deft guilty as charged.

The Court approves and signs the govt's proposed findings.

SENTENCING set for 3/27/78 at 2:00p.m. Deft referred to P/O for pre-sentence report.

cc: P/O

Initials of Dep. Clerk /s/

APPENDIX B-1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff-Appellee	)	No. 78-1917
vs.	)	Order Denying
ARDIE McBREARTY, Defendant-Appellant	)	Petition for Rehearing

Before: CHAMBERS, BRIGHT and TANG, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX B-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

vs CASE NO. 78-1917

ARDIE McBREARTY,
Defendant/Appellant.

MOTION FOR STAY OF MANDATE

APPELLANT-DEFENDANT, above named, respectfully moves this Court for a Stay Of Mandate pending Appellant's Petition to the United States Supreme Court for a Writ Of Certiorari.

Respectfully submitted,

Dated: May 1, 1979 /s/
Ardie McBrearty, Appellant

CERTIFICATE OF SERVICE:

One copy of this Motion For Stay Of Mandate was sent to the U.S. Attorney for the Central District Of California by U.S. Mail on May 1, 1979.

/s/
Ardie McBrearty

APPENDIX C-1: U.S. Const., Article I, Section 8

The Congress shall have Power...To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;... .

APPENDIX C-2: Title 31, U.S. Code, Section 391

LEGAL TENDER.

All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve Banks and national banking associations), regardless of when coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues.

APPENDIX C-3: Title 31, U.S. Code, Section 454

LEGAL-TENDER QUALITY OF MONEY.

Nothing contained in sections (xxx)...shall be construed to affect the legal-tender quality as now provided by law of the silver dollar, or of any other money coined or issued by the United States.

APPENDIX C-4: IRS Revenue Ruling 76-249
(In pertinent part)

Under the circumstances described above, the silver coins received by the taxpayer for the real property were themselves property. Accordingly, the tax payer exchanged real property with an adjusted basis of $2,000 for property (silver coins) with a fair market value of $6,000,....."

JUDICIAL NOTICE

(Petitioner calls Judicial Notice to the strange wording of IRS Rev. Ruling 76-249 where the Internal Revenue Service says in effect, that some "$" are worth less than other "$", this is in direct contradiction to 31 USC 454.)

APPENDIX C-5: U.S. Constituion, Article VI

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ..., shall be the supreme Law of the Land;...and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution;... .

APPENDIX C-6: U.S. Const. Amendment Five

No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;... .

APPENDIX C-7: U.S. Const. Amendment Six

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..., and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; ... .

APPENDIX C-8: Title 26, U.S. Code, Section 6012

(a) General Rule. Returns with respect to income taxes under subtitle A shall be made by the following:

(1)(a) Every individual having for the taxable year a gross income of (a specified number) $_____ or more, ...

(NOTE: This amount varies from year to year)

JUDICIAL NOTICE

(Nowhere in Title 26, USC, is this symbol "$" defined. But, IRS Rev. Rulings 76-249 & 78 - 360 set forth confliciting definitions.)

APPENDIX C-9: Title 26, U.S. Code, Section 6020(b)

Returns prepared for or executed by Secretary.
(a) Preparation of return by Secretary.
(b) Execution of return by Secretary.

(1) Authority of Secretary to execute return.

If any person fails to make any return... required by an internal revenue law or regulation made thereunder at the time prescribed therefore, ...the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.

APPENDIX C-10: Title 26, U.S. Code, Section 7203

WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return..., keep any records, or supply information, who willfully fails..., to make such return,... or supply such information, at the time or times required by law or regulations,...shall, in addition to other penalties provided by law, be guilty of a misdemeanor and,... .

APPENDIX C-11: Title 26 U.S. Code, Section 6103(d)

Confidentially and disclosure of returns and return information.

(d) Disclosure to state tax officials.

Returns and return information with respect to taxes imposed by chapters..., shall be open to inspection by or disclosure to any State agency, body, or commission, or its legal representative, which is charged under the laws of such State with responsibility for the administration of State tax laws... .